

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ANGEL SARMIENTO : DETERMINATION
for Review of a Notice of Proposed Driver's License : DTA NO. 830461
Suspension Referral under Tax Law Article 8, § 171-v. :
:

Petitioner, Angel Sarmiento, filed a petition for review of a notice of proposed driver's license suspension referral under Tax Law article 8, § 171-v.

The Division of Taxation, appearing by its representative, Amanda Hiller, Esq. (Karry L. Culihan, Esq., of counsel), filed a motion on December 29, 2022, seeking an order dismissing the petition or, in the alternative, granting summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9 (a) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by Glenn H. Ripa, Esq., responded to the Division of Taxation's motion on January 30, 2023, which date commenced the 90-day period for issuance of this determination pursuant to 20 NYCRR 3000.5 (d). Based upon the motion papers, the affidavits and documents submitted, and all pleadings and documents submitted in connection with this matter, Barbara J. Russo, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation's notice of proposed driver's license suspension referral pertaining to petitioner should be sustained.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioner, Angel Sarmiento, a notice of proposed driver's license suspension referral (form DTF-454), Collection case ID: E-043736691-CL01-5 (60-day notice or notice), advising that petitioner must pay his New York State tax debts or face the possible suspension of his driver's license pursuant to Tax Law § 171-v.

2. The 60-day notice is dated August 14, 2019, and is addressed to petitioner at his Maspeth, New York, address. Included with the 60-day notice was a consolidated statement of tax liabilities (form DTF-967-E), also dated August 14, 2019, setting forth one unpaid assessment subject to collection action. The assessment was for sales tax, assessment ID L-043736691, for the tax period ended February 28, 2014. The assessment was for tax in the amount of \$63,135.26, and interest in the amount of \$36,835.58, and shows a payment/credit in the amount of \$12,636.01, for a total balance due of \$87,334.83.

3. The 60-day notice indicated that a response was required within 60 days from its mailing, or the Division would notify the New York State Department of Motor Vehicles (DMV) and petitioner's driver's license would be suspended. The 60-day notice informed petitioner that in order to avoid suspension of his license, he was required to either pay the amount due or respond by formally protesting the proposed suspension within 60 days and provide proof that one of the listed statutory exemptions applied.

4. The 60-day notice lists "Statutory exemptions from driver's license suspension" as follows:

“ – Commercial Driver's License (CDL) – You have a commercial driver's license. CDLs are not subject to suspension as part of this law.

- Income execution – The Tax Department is already garnishing your wages to pay these debts.

- Child support – Your wages are being garnished, or you have made satisfactory payment arrangement with a child support collection unit for the payment of child support or combined child and spousal support from this state or any other state.
- Public assistance – You receive public assistance benefits. Public assistance refers to temporary assistance programs that provide either cash assistance or in-kind benefits to individuals and families (for example, SNAP, HEAP, Temporary Assistance).
- Supplemental Security Income (SSI) – You receive SSI benefits. SSI is a federal income supplement program (not Social Security benefits) and is designed to help aged, blind, and persons with disabilities with little or no income.
- Suspension of your driver’s license will cause undue economic hardship – You must complete Forms DTF-5.1, Application for Undue Economic Hardship Exemption from Driver’s License Suspension Program, and DTF-5, Statement of Financial Condition, to demonstrate this hardship.”

5. The second page of the 60-day notice explains “How to protest” as follows:

“New York State Law limits the grounds for challenging the suspension of your driver’s license to the statutory exemptions listed above. If you believe you are eligible for an exemption, and that your license should not be suspended, you can protest the proposed suspension of your driver’s license.

Unless you formally protest the proposed suspension of your license within 60 days from the date of this notice, we will recommend that the DMV suspend your driver’s license and your right to formally protest will expire.

You may formally protest this letter by either:

- Filing Form CMS-1-MN, Request for Conciliation Conference (available on our website), with the Tax Department; or
- Filing from [sic] TA-100, Petition, with the Division of Tax Appeals (available at www.dta.ny.gov).

6. The 60-day notice further states that:

“You should also contact the Tax Department if:

- You are not the taxpayer named in the notice.
- The tax debt has been paid.

- You are eligible for innocent spouse relief under § 654 of the Tax Law for certain New York State income tax debts. . . .
- Enforcement of the underlying tax debts has been stayed in the filing of a bankruptcy petition.
- You are interested in learning about other options that may be available to you to resolve your debt.”

7. Petitioner requested a conciliation conference before the Bureau of Conciliation and Mediation Services (BCMS) protesting the notice. By conciliation order dated March 12, 2021, the conferee sustained the statutory notice. The caption of the conciliation order indicates that petitioner’s request for conciliation conference was for redetermination or revision of the notice of proposed driver’s license suspension referral under article 8 of the Tax Law.

8. Thereafter, petitioner filed a petition with the Division of Tax Appeals on April 29, 2021, protesting the conciliation order and notice. The caption of the petition states that the protest is being brought under “Article 8 of the Tax Law” for the period “6/1/2012 to 2/28/2014.” The petition lists the notice/assessment number L-043736691 as the notice/assessment being challenged. In the section for “Reason(s) for Dispute,” the petitioner states,

“This assessment was made against the Taxpayer as a responsible party of the sales tax due and owing by a corporate entity. During the period in question, this taxpayer was no longer the owner of the corporate entity nor involved in the operations of the entity. Furthermore when the audit was conducted he was not aware of the audit and therefore he was unable to defense [sic] himself with respect to the audit. Based upon these facts he should never have been held personally liable for these sales tax liabilities. Both the assessment in question and the Conciliation Order denying the dismissal of this assessment must be dismissed.”

9. Attached to the petition was a copy of the March 12, 2021 conciliation order and a consolidated statement of tax liabilities, dated June 14, 2019, listing assessment number L-043736691. The notice of determination bearing assessment identification number L-

043736691 was not attached to the petition.

10. Assessment number L-043736691 was the subject of *Matter of Sarmiento* (Tax Appeals Tribunal, December 20, 2018), wherein the Tax Appeals Tribunal determined that petitioner's protest of the assessment was untimely and dismissed the petition for the period June 1, 2012 through February 28, 2014.

11. The Division submitted with its motion an affidavit, dated December 5, 2022, of Todd Lewis, who is employed as a Tax Compliance Manager 4 with the Division's Civil Enforcement Division (CED). Mr. Lewis's responsibilities and duties include overseeing the operations of the CED's Operations Analysis and Support Bureau and working with the Office of Information Technology Services. His affidavit is based upon his personal knowledge of the facts in this matter and a review of the Division's official records, which are kept in the ordinary course of business.

12. Mr. Lewis's affidavit details the sequential actions, i.e., the initial process, the DMV data match, the suspension process and the post-suspension process, undertaken by the Division in carrying out the license suspension program authorized by section 171-v, article 8, of the Tax Law. These steps are summarized as follows:

a) The "Initial Process" involves the Division's identification of taxpayers who may be subject to the issuance of a 60-day notice of proposed driver's license suspension referral under Tax Law § 171-v. First, the Division internally sets the following selection criteria: the taxpayer has an outstanding cumulative balance of tax, penalty and interest in excess of \$10,000.00; the age of the assessment used to determine the cumulative total must be less than 20 years from the notice and demand issue date; all cases in formal or informal protest, and all cases in bankruptcy status are eliminated; all cases where taxpayers have active approved payment plans are

excluded; and any taxpayer with a “taxpayer deceased” record on his or her collection case is excluded.

Next, the criteria are utilized to search the Division’s databases on a weekly basis, and a file is created of possible taxpayers to whom a 60-day notice of proposed driver’s license suspension referral could be sent. This process involves first utilizing the criteria to identify taxpayers owing a cumulative and delinquent tax liability (tax, penalty and interest) in excess of \$10,000.00 in the relevant time frame, and then for each such identified candidate, determining whether that candidate would be excluded under any of the following criteria:

- a formal or informal protest has been made with respect to any assessment included in the cumulative balance of tax liability where the elimination of such assessment(s) would leave the balance of such liability below the \$10,000.00 threshold for license suspension;
- the taxpayer is in bankruptcy;
- the taxpayer is deceased;
- the taxpayer is on an active approved payment plan; or
- the taxpayer’s wages are being garnished for the payment of past-due tax liabilities, child support, or combined child and spousal support arrears.

b) the “DMV Data Match” involves the Division providing identifying information to DMV for each taxpayer not already excluded under the foregoing criteria to determine whether the taxpayer has a qualifying driver’s license potentially subject to suspension per Tax Law § 171-v. DMV then conducts a data match of the information provided by the Division with its information and returns the following information to the Division: (1) social security number; (2) last name; (3) first name; (4) middle initial; (5) name suffix; (6) DMV client ID; (7) gender; (8) date of birth; (9) street; (10) city; (11) state; (12) zip code; (13) license class; and (14) license

expiration date.

Once the Division determines that a taxpayer included in the DMV Data Match has a qualifying driver's license, that taxpayer is put into the suspension process.

c) The "Suspension Process" commences with the Division performing a post-DMV data match review to confirm that the taxpayer continues to meet the criteria for suspension detailed above in (a). If the taxpayer remains within the criteria for suspension, then a 60-day notice of proposed driver's license suspension referral will be issued to the taxpayer via first class United States mail with a certificate of mailing.

After 75 days with no response from the taxpayer, and no update to the case such that the matter no longer meets the requirements for license suspension (i.e., the case is not on hold or closed), the case will be electronically sent by the Division to DMV for license suspension.¹

Such case data is sent daily, Monday through Friday, by the Division to DMV. DMV then sends a return data file to the Division each day confirming data records that were processed successfully, and indicating any data records with an issue. The Division investigates those data records with an issue. With regard to the data records that were processed successfully, DMV sends a 15-day letter to the taxpayer, advising of the impending license suspension. In turn, if there is no response from the taxpayer, and DMV does not receive a cancellation record from the Division, the taxpayer's license will be marked as suspended on the DMV database.

d) The "Post-Suspension Process" involves monitoring events subsequent to license

¹ Prior to license suspension, the Division performs another compliance check of its records. If, for any reason, a taxpayer "fails" the compliance criteria check, the case status will be updated to "on-hold" or "closed" (depending on the circumstances) and the suspension will be stayed. If the status is "on-hold," the 60-day notice of proposed driver's license suspension referral remains on the Division's system but the suspension will not proceed until the "on-hold" status is resolved. If the suspension is "closed," the 60-day notice will be canceled. If the taxpayer "passes" this final compliance check, the suspension by DMV will proceed.

suspension so as to update the status of a suspension that has taken place. Depending upon the event, the status of a suspension may be changed to “on-hold” or “closed.” A change to “on-hold” status can result from events such as those set forth above in (a) (e.g., the filing of a protest, a bankruptcy filing, or the creation and approval of an installment payment agreement). Where a subsequent event causes a case status change to “on-hold,” the license suspension would be revoked by DMV and the matter would not be referred back to DMV by the Division for resuspension until resolution of the “on-hold” status; however, the 60-day notice of proposed driver’s license suspension referral would remain in the Division’s system. If the status is changed to “closed,” the 60-day notice of proposed driver’s license suspension referral is canceled.

13. Mr. Lewis’s affidavit also fully details how that process was followed by the Division in the instant matter concerning the 60-day notice issued to petitioner. A copy of the 60-day notice of proposed driver’s license suspension referral and the consolidated statement of tax liabilities described in findings of fact 1 and 2, and a payment document (form DTF-968.4), by which petitioner could remit payment against the liability in question, were included with Mr. Lewis’s affidavit. Mr. Lewis avers that based upon his review of Division records and his personal knowledge of Departmental policies and procedures regarding driver’s license suspension referrals, the issuance of the 60-day notice to petitioner on August 14, 2019 comports with statutory requirements, petitioner has not raised any of the specifically listed grounds for challenging such a notice set forth at Tax Law § 171-v (5) and, therefore, the 60-day notice has not been, and should not be, canceled.

14. Included with the Division’s motion papers is a copy of a consolidated statement of

tax liabilities, dated August 14, 2019, listing an unpaid assessment subject to collection action, assessment ID L-043736691, for the tax period ended February 28, 2014, for tax in the amount of \$63,135.26, and interest in the amount of \$36,835.58, and showing a payment/credit in the amount of \$12,636.01, for a total balance due of \$87,334.83 (*see* finding of fact 2)

15. The Division asserts that the August 14, 2019 notice complies with Tax Law § 171-v and that petitioner has not sought relief from the suspension of his driver's license under any of the specifically enumerated grounds for such relief set forth at Tax Law § 171-v (5) and, thus, has raised no basis for administrative or judicial review of the proposed suspension of his license, including review by the Division of Tax Appeals. Accordingly, the Division seeks dismissal of the petition for lack of jurisdiction or summary determination in its favor.

16. In opposition to the Division's motion, petitioner argues that he is challenging the assessment and conciliation order, not the revocation of his driver's license.

CONCLUSIONS OF LAW

A. Petitioner's argument that the Division's motion should be denied based on the contention that he is challenging the assessment and conciliation order, not the revocation of his driver's license, is rejected. Petitioner's claim that the petition does not challenge the driver's license revocation and instead only challenges the conciliation order and underlying assessment is disingenuous. In the caption of the petition, petitioner listed "Article 8" as the tax article being challenged. The provisions regarding driver's license suspension are contained within article 8, § 171-v of the Tax Law. Petitioner did not list articles 28 and 29 of the Tax Law, the articles for which the underlying assessment was issued, in the caption of the petition. While the petition listed notice/assessment ID number L-043736691 in the section for "notice/assessment numbers," petitioner did not attach a copy of that notice to the petition.

Instead, petitioner attached a copy of the consolidated statement of tax liabilities showing an unpaid assessment subject to collection action, assessment ID L-043736691, for the tax period ended February 28, 2014, and a copy of the conciliation order being challenged. As noted in finding of fact 7, the caption of the conciliation order indicates that petitioner's request for conciliation conference was for redetermination or revision of the notice of proposed driver's license suspension referral under article 8 of the Tax Law. As such, the petition clearly protested the driver's license suspension notice and conciliation order sustaining the suspension, and the Division's motion for summary determination was properly made.

To the extent that the petition also challenged the underlying assessment, notice number L-043736691, petitioner previously challenged said notice by a prior petition, and the petition was conclusively dismissed by the Tax Appeals Tribunal (*Matter of Sarmiento*). Petitioner's attempt to once again challenge that same notice, number L-043736691, is barred by res judicata (*see O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]).

B. Tax Law § 171-v provides for the enforcement of past-due tax liabilities through the suspension of drivers' licenses. The Division must provide notice to a taxpayer of his or her inclusion in the license suspension program no later than 60 days prior to the date the Division intends to refer the taxpayer to DMV for action (*see* Tax Law § 171-v [3]). At issue is a 60-day notice, dated August 14, 2019, addressed to petitioner, advising him of the possible suspension of his driver's license. This notice is in facial compliance with the terms of Tax Law § 171-v, in that it is specifically based on: a) the Division's claim that a sales tax assessment pertaining to petitioner and reflecting tax, interest and penalty due in the amount of \$87,334.83, remains outstanding and unpaid; and b) petitioner does not meet any of the eight specifically enumerated grounds set forth at Tax Law § 171-v (5) (i) - (viii) allowing for relief from license suspension.

C. As noted, the Division brings a motion to dismiss the petition under section 3000.9 (a) of the Tax Appeals Tribunal's Rules of Practice and Procedure (Rules) or, in the alternative, a motion for summary determination under section 3000.9 (b). A motion for summary determination "shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented" (20 NYCRR 3000.9 [b] [1]).

D. Section 3000.9 (c) of the Rules provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). As summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is "arguable" (*Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *Museums at Stony Brook v Village of Patchogue Fire Dept.*, 146 AD2d 572, 573 [2d Dept 1989]). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*Gerard v Inglese*, 11 AD2d 381 [2d Dept 1960]). "To defeat a motion for summary judgment, the opponent must . . . produce 'evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim'" (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992], citing *Zuckerman*).

E. A taxpayer's right to challenge a notice issued pursuant to Tax Law § 171-v is specifically limited, and must be based on one of the following grounds:

- “(i) the individual to whom the notice was provided is not the taxpayer at issue;
- (ii) the past-due tax liabilities were satisfied;
- (iii) the taxpayer’s wages are being garnished by the department for the payment of the past-due tax liabilities at issue or for past-due child support or combined child and spousal support arrears;
- (iv) the taxpayer’s wages are being garnished for the payment of past-due child support or combined child and spousal support arrears pursuant to an income execution issued pursuant to section five thousand two hundred forty-one of the civil practice law and rules;
- (v) the taxpayer’s driver’s license is a commercial driver’s license as defined in section five hundred one-a of the vehicle and traffic law;
- (vi) the department incorrectly found that the taxpayer has failed to comply with the terms of a payment arrangement made with the commissioner more than once within a twelve month period for the purposes of subdivision three of this section;
- (vii) the taxpayer received public assistance or supplemental security income; or
- (viii) the taxpayer demonstrates that suspension of the taxpayer’s driver’s license will cause the taxpayer undue economic hardship” (Tax Law § 171-v [5]).

Petitioner has not raised any argument based on the enumerated grounds nor produced evidentiary proof in admissible form in opposition to the Division’s motion. As such, the Division’s motion is properly granted.

F. The Division of Taxation’s motion for summary determination is hereby granted. The petition of Angel Sarmiento is denied, and the Division’s notice of proposed driver’s license suspension, dated August 14, 2019, is sustained.

DATED: Albany, New York
April 20, 2023

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE